BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34662

OPPOSITION OF THE DISTRICT OF COLUMBIA TO CSXT'S PETITION FOR DECLARATORY ORDER

Introduction

The District of Columbia ("the District"), pursuant to 49 C.F.R. § 1104.13(a), hereby submits its opposition to the Petition for Declaratory Order filed by CSX Transportation, Inc. ("CSXT").

A terrorist attack on a truck or a train containing hazardous materials in the area demarcated in the challenged legislation would be catastrophic. The Council of the District of Columbia ("Council"), in two public hearings, heard testimony that such an attack could cause tens of thousands of deaths and economic impacts of upwards of $5 billion. *See* Statement of Councilmember Patterson on Introduction, "The Terrorism Prevention in Hazardous Materials Transportation Act of 2005." (Jan. 28, 2005) (copy attached as District Exhibit No. ("DEx.") 1). *See also* 51 D.C. Reg. 10607 (Nov. 19, 2004) (notice of public hearing); 50 D.C. Reg. 11042 (Dec. 26, 2003) (notice of public hearing).[1]

The Federal Bureau of Investigation ("FBI") has reported that terrorists are specifically interested in "targeting hazardous material containers" in attacks on rail cars on U.S. soil. DEx. 1 at 2 (*citing* October 24, 2002, FBI alert). The Department of Homeland Security ("DHS") has

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[1] Indeed, the Honorable Eleanor Holmes Norton, the District's nonvoting congressional representative, called the risk of terrorist attack on hazardous materials the "single greatest unaddressed security threat to the City." DEx. 1 at 1.

also reported that terrorists may seek to use trucks carrying such materials as weapons. DEx. 1 at 2 (*citing* July 30, 2004, DHS advisory).

> Contrary to the implications of CSXT, the federal government has not acted in this area.
>
> Federal agencies have recognized that the security concerns raised by possible terror attacks on hazardous rail shipments are not adequately addressed by rules pertaining to accidental releases. *See, e.g.*, 68 Fed Reg. 14514 (March 25, 2003) (existing regulations "focused on safety, not security" and are insufficient for preventing products from being used "as weapons of opportunity" or as ingredients in "weapons of mass destruction").
>
> The terrorism threat facing D.C. residents and workers in the vicinity of the Capitol Exclusion Zone requires a response that recognizes and addresses the unique status of this area in American political life and history, and the terrorism risk that results from this status.

DEx. 1 at 3.

The Council also heard testimony on risk assessment, indicating that routing hazardous materials shipments away from a vulnerable, highly populated area such as the District would be less costly than preparing for, or sustaining the actual costs of, a terror attack on such shipments. DEx. 1 at 6 (*citing* Testimony of Professor Theodore Glickman, Nov. 22, 2004).

The narrowly crafted law here affects only a subset of hazardous materials to be shipped, and then only certain large quantities of those materials. "[P]robably representing less than 5% of the conventional hazardous materials that move regularly through Washington." DEx. 1 at 7. Moreover, the law does not unconditionally prohibit the transportation through the zone of the referenced materials, but authorizes a permit for such transportation if the carrier can demonstrate that rerouting would be "cost-prohibitive;" *i.e.*, with "no practical alternative route" available. Petitioner's Ex. 1 at 2. Additionally, emergencies elsewhere in the transportation system may allow temporary, otherwise unpermitted shipments through the zone. *Id*. at 1–2.

In the face of such compelling facts, CSXT, understandably, does not challenge the law on the purposes for which it was enacted, but presses its economic, interstate-commerce arguments in a more prosaic fashion—that the legislation would cause a "disruption of rail service" and "significant disruptions to efficient carrier operations." Petition at 1, 5. CSXT's interests cannot trump the District's fundamental right and obligation to protect its citizens. The District of Columbia acts here in its most basic role "as a guardian and trustee for its people." *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 207 n.3 (1983).

Argument

As noted previously, the District objects to the denial of the full time allotted in the Board's rules; there is no imminent "emergency." There is certainly no "emergency" requiring an expedited ruling from the Board, and, at any rate, the Board has no power to ameliorate any claimed "emergency," because it cannot enjoin the enforcement of a District of Columbia statute.

To the extent CSXT makes factual allegations concerning, and requests a ruling on, the "effect" the District law will have on its operations, *see* Petition at 8, the District would require prehearing discovery on that "imminent harm" issue, *i.e.*, the ability of CSXT to reroute trains or to interchange traffic with other carriers and the costs/benefits of doing so. *See* 49 C.F.R. § 1114.21(a) (party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding"). Moreover, the District should be permitted to present evidence on the risks of the terrorist attacks and catastrophic loss of life and property, in order for the Board to properly balance the "burden" on interstate commerce with the benefit of the protection the law provides, if the Board decides to undertake such an analysis.

To the extent CSXT requests an order that allows it "to route traffic along the routes to which the DC Ordinance [sic] applies[,]" Petition at 1, the District asserts that the Board does not have the jurisdiction to authorize CSXT to violate District law, nor does the Board have authority to enjoin the enforcement of District law.[2]

Finally, if the Board rules prematurely, it risks upsetting the promulgation of the rules contemplated by the legislation, *see* Petitioner's Ex. 1 at Sec. 7, which rules, when final, may obviate CSXT's need for relief.

The Mayor of the District of Columbia signed the legislation late yesterday. Either the subsequent rulemaking will be on an emergency basis, in which case the rules will become effective immediately and expire in 120 days, or proposed rules will be promulgated with a 30-day period for comments. *See* D.C. Official Code § 2-505 (2001 ed.). In any event, the District has already committed to giving CSXT advance notice of implementation (no less than 10 days for an emergency rulemaking, and 30 days for a standard-track rulemaking). Consequently, because the law is not self-executing, there is no "imminence" here requiring precipitate action by the Board.

The Board Should Decline to Issue a Declaratory Order.

The Board, like all federal agencies covered by the Administrative Procedure Act, maintains the discretion to decline to issue declaratory orders, so long as it adequately explains its reasons for doing so. 5 U.S.C. § 554(e) (2005) ("The agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); *see also, e.g.,*

[2] If the District were a state, there would be little question that this Board would lack jurisdiction over the instant petition. *See Federal Maritime Comm. v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002) ("state sovereign immunity bars the [agency] from adjudicating complaints filed by a private party against a nonconsenting state.").

Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 747 n.38 (D.C. Cir. 1986) (noting that, in cases in which a federal agency's refusal to issue a declaratory order has been affirmed, "the agency explicitly relied on its discretion to so refuse and discussed the justifications for its exercise of this discretion."); *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982) ("[T]he critical concern of the reviewing court is that the agency provide a coherent and reasonable explanation of its exercise of discretion."). *Cf. Intercity Transportation Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984) ("limited review" of ICC's refusals to institute declaratory judgment proceedings; agency's refusal affirmed merely where "its refusal to issue declaratory relief was due to a judgment that its limited resources are better allocated to other areas").

Here, there are several compelling reasons for the Board to decline to exercise its discretion, discussed in greater detail below, not the least of which is the potential interference with efforts by the District to protect its citizens from an identified security risk.[3]

Moreover, while not explicitly requesting an injunction, CSXT could not, in any event, argue that the Board has authority to enjoin the processes of the District government in the exercise of its police powers. It is true that the Board has the authority to stay some actions of private parties who are affirmatively seeking the benefits of the agency's jurisdiction. 49 U.S.C. § 11702 (Board may bring civil action "to enjoin a rail carrier" from violating [§§ 10901 through 10906]). *See also, e.g., Public Views on Major Rail Consolidations*, STB *Ex Parte* No. 582 (STB served March 17, 2000 and April 7, 2000), *aff'd sub nom. Western Coal Traffic League v. STB*, 216 F. 3d 1168 (D.C. Cir. 2000) (Board empowered to issue a moratorium on railroad mergers, pursuant to 49 U.S.C. § 11321 *et seq.*). However, the Board has no authority to enjoin the

[3] CSXT itself acknowledges the "many public policy issues" surrounding enactment and enforcement of the disputed law. Petition at 2

District here. *Water Transport Assn. v. ICC*, 715 F.2d 581, 585 n.9 (D.C. Cir. 1983) ("The ICC, however, has no power to enjoin anything, and must go to district court to seek an injunction if it decides that injunctive relief is appropriate."), *cert. denied*, 465 U.S. 1006 (1984)).

Finally, because the federal courts have full authority to hear claims pursuant to federal law, and to grant any appropriate relief thereon, the Board should not interfere with the pending local process and should deny CSXT's Petition. *See Green Mountain Railroad Corporation - - Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002) at 4 (request for declaratory order denied where railroad also requested judicial relief from federal district court, which has enforcement authority).

The District's Legislation is Not Preempted.

CSXT contends that the challenged District legislation is entirely preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10501(b). Petition at 11. CSXT is incorrect.

Contrary to CSXT's suggestions, section 10501(b) is not a federal license to ignore the laws of state and local governments. Federal preemption of state and local regulation over a railroad is limited to circumstances where state or local authorities attempt to use regulation as a means of foreclosing or unfairly restricting a railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce. Accordingly, §10501(b) does not prohibit the District from exercising its police power to impose nondiscriminatory regulations to protect public health and safety. CSXT should not be permitted to misuse federal preemption as a means of escaping reasonable local regulation in this factually compelling and unique situation.

CSXT's view of the nature of the preemption provision implicated here ignores contrary case law, and materially overstates the application of preemption under 49 U.S.C. § 10501(b).

The Board itself—not to mention the federal courts—has made clear that § 10501(b) does not prevent state or local governments from exercising their traditional police powers in a nondiscriminatory fashion to protect public health and safety. *See, e.g., Borough of Riverdale – Petition for Declaratory Order*, STB Finance Docket No. 33466 (STB served September 10, 1999). Federal preemption of state or local regulation over a rail carrier is limited to situations where such regulations "foreclos[e] or restric[t] the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce." *Id*. at 8.

Indeed, the Board has made it clear that §10501(b) was intended to preempt only state and local regulation that would "*deny the carrier* the right to construct facilities or conduct operations." *See, e.g., Joint Petition for Declaratory Order - - Boston and Maine Corporation and Town of Ayer, MA, ("Town of Ayers")* STB Finance Docket No. 33971 (STB served May 1, 2001) at 8 (emphasis added). The STB applies this preemption to non-safety measures adopted by states. However, the Board has stated that in the area of safety (which includes security for the purpose of this discussion), state or local rules are not preempted if they are consistent with the Federal Rail Safety Act (discussed *infra*). In other words, the bar is lower for safety matters (*i.e.*, the Board should be more reluctant to find preemption), and the Board does not subsequently ask whether commerce would be unduly burdened.

Here, the legislation does not deny CSXT or anyone else the "right" to conduct operations, and nowhere does CSXT so contend. CSXT has not alleged, much less demonstrated, that it is *incapable* of complying with the challenged legislation; it simply would prefer to avoid the administrative burdens and costs of compliance. Federal preemption is not so easily claimed.

The Board itself has recognized that ICCTA preemption is not intended to interfere with the non-discriminatory exercise of state police powers that are essential for the protection of public health and safety. *Id*. at 9; *Auburn & Kent, WA—Petition For Declaratory Order—Stampede Pass Line*, 2 S.T.B. 330, 337–39 (1997), *affirmed, City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999)).

The Board has elected to entertain and grant petitions for declaratory orders only where the state or local community attempted to use regulation as a means to prohibit or impede legitimate rail operations as a "not in my backyard" or "NIMBY" response to change. *See, e.g. Town of Ayers, supra; North San Diego County Transit Development Board—Petition for Declaratory Order* (STB served August 21, 2002). At the same time, however, the Board has elected not to intervene where the state or local community is not attempting to frustrate and delay rail operations, but is instead concerned with legitimate environmental or safety issues. *Fletcher Granite Company, LLC—Petition for Declaratory Order*, STB Finance Docket No. 34020 (STB served June 25, 2001) at 2. There can be no question that the concerns implicated by the disputed legislation are not the run-of-the-mill environmental or economic development issues analyzed in the above cases.

It is precisely to prevent the result sought by parties such as CSXT here that there is strong presumption *against* preemption, which "start[s] with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted). Indeed, "[p]reemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterprises v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002). Where federal and state or local

enactments overlap in their effects on non-governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (Supreme Court "generally reluctant to infer preemption" and it would be "particularly inappropriate to do so in this case because the basic purposes of the state statute and the [federal act] are similar.").

Federal courts continue with this reluctance. In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court noted the presumption against preemption recognized by the Supreme Court, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the legislation "is limited to remedies with respect to rail regulation—not State and Federal law generally . . because they do not generally collide with the scheme of *economic regulation* (and deregulation) of rail transportation," thus identifying a clear limit on the use of the exemption provided in the ICCTA. *Id*. at 1338 (emphasis added). Here, as noted, the issue is not the "economic regulation" of CSXT, but the safety of hundreds of thousands of the District's residents and visitors.

Moreover, recent, controlling case law indicates that another agency, the Federal Railroad Administration ("FRA") has primary jurisdiction over railroad safety—a fact that CSXT overlooks. *Boston and Maine Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 321 (D.C. Cir. 2004) ("primary jurisdiction over railroad safety belongs to the [FRA], not the STB.") (citations omitted). *See also Tyrell v. Norfolk Southern Railway Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (same). In such circumstances, the D.C. Circuit will not defer, as it usually does, to an agency's claim to exclusive jurisdiction. *See Government of the Territory of Guam v. Sea-Land Service, Inc.*, 958 F.2d 1150, 1155 n.7 (D.C. Cir. 1992) (*citing CF Indus., Inc. v. FERC*, 925 F.2d 476, 478 n.1 (D.C. Cir. 1991)).

The FRA's enabling act has been updated in light of the terrorist incidents of 9/11. *See* Federal Railroad Safety Act ("FRSA"), *codified as amended at* 49 U.S.C. §§ 20101 *et seq*. (2005). Even a cursory review of that law reveals that Congress explicitly authorized states to act (1) where the federal government has not yet acted, and (2) to impose more stringent laws in certain circumstances:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security *until* the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), *prescribes a regulation or issues an order covering the subject matter* of the State requirement. A State may adopt or continue in force *an additional or more stringent law*, regulation, or order related to railroad safety or security when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

Id. at 49 U.S.C. § 20106 (emphasis added).

The challenged District legislation clearly meets the first standard, because even CSXT concedes that no federal agency has issued any regulation or order governing the rerouting of hazardous materials to avoid terrorist threats. Petition at 5–6 ("Neither the FRA—nor any other federal agency—has issued any order prohibiting CSXT from transporting hazardous commodities on its lines through the District of Columbia. [N]either [the Transporation Security Administration], nor any other federal agency, has directed CSXT to reroute hazardous commodities away from its lines through the District of Columbia.").[4]

[4] CSXT is hoist on the petard of its own circular syllogism: it argues that the District should not or cannot act here because the federal government has not acted. But that lack of federal action is precisely the reason given in the FRSA to authorize local action.

It is not simply enough for preemption here, as CSXT implies, that a federal regulation touch on the same general subject matter as the challenged local legislation. Rather, in order to preempt a state regulation, the federal regulation must "substantially subsume" the subject matter of that regulation. *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993).

The District is not aware of any federal regulation covering the specific "subject matter" of the District's legislation, the rerouting of hazardous materials to reduce the demonstrated threat posed by incidents of terrorism in the District.[5] It does not appear that either DHS or DOT has issued *any* regulations addressing the security concerns created by routing hazardous materials in close proximity to major terrorism targets. *Cf.* n.5, *supra*, and n.7, *infra*, and accompanying text.

To the extent the federal government has acted, it has imposed only general "security" requirements, without mandating—or precluding—rerouting of specific hazardous materials. *See* 68 Fed Reg. at 14514, 49 C.F.R. § 800 (requiring shippers and carriers of hazardous materials to develop and implement a "security plan" aimed at "addressing and reducing security risks."); 49 C.F.R. § 172.702(a)(4) (mandating safety training for employees involved in transportation of hazardous materials, including "how to recognize and respond to possible security threats.").

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[5] DOT and DHS issued a notice last summer:

> [S]eeking comments on the feasibility of initiating specific security enhancements and the potential costs and benefits of doing so. Security measures being considered include improvements to security plans, modification of methods used to identify shipments, enhanced requirements for temporary storage, strengthened tank car integrity, and implementation of tracking and communication systems.

69 Fed. Reg. 50988 (Aug. 16, 2004). This notice does not mention the rerouting of hazardous materials as a potential method for addressing the security concerns identified by the District here. A subsequent notice indicates that the federal government considers this effort one of many "[l]ong-term actions." *See* 69 Fed. Reg. 73491, 73513 (Dec. 13, 2004).

Moreover, even if the District's law touches a subject already "covered" by federal law, the challenged legislation meets the *second* standard under the FRSA, because it is necessary to reduce an essentially local safety or security hazard—the unique position of the District of Columbia as the capital of the United States and a prime target for terrorist attacks, one of only two metropolitan areas attacked on 9/11.

The Sixth Circuit, even before 9/11, analyzed this specific section of the FRSA, and concluded that a state is authorized to take action thereunder. *Tyrell*, 248 F.3d at 523–24. The Sixth Circuit reversed the trial court's finding that, under the ICCTA, the STB's "exclusive regulatory jurisdiction" preempted Ohio's safety regulation mandating minimum clearance between newly constructed (or reconstructed) tracks. *Id*. at 520.[6]

> A debate over whether this type of railroad regulation is an historical function of the federal government or the States is unnecessary as the Supreme Court specifically held that a presumption against federal preemption is embodied in the saving clauses of 49 U.S.C. § 20106. *See Easterwood*, 507 U.S. at 665, 668. [T]o prevail on a claim that federal regulations are preemptive, a party "must establish more than that they 'touch upon' or 'relate to'" the state regulation's subject matter. *Easterwood*, 507 U.S. at 664. Instead, "preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id*.

Id. at 524.

Here, if the FRSA does not preempt so ordinary a topic as track placement for safety reasons, it should not preempt the singularly important subject of the District's law.

The railroad in *Tyrrell* also argued, *inter alia*, that "negative preemption" prohibited the Ohio regulation, citing a previous Sixth Circuit case in which the FRA had explicitly decided not

[6] This honorable Board appeared as *amicus curiae* in support of the plaintiff in that case, agreeing that the Ohio regulation involved safety, and thus must be analyzed under the FRSA. *Id*. at 521.

to adopt the specific regulations that Ohio subsequently enacted. *Id*. (*citing Norfolk & w. Ry. v. Public Utility Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991)). The court *rejected* that argument:

> [N]o evidence in this case demonstrates that the FRA considered track clearance requirements and explicitly decided that no regulation in the area was necessary. [C]urrently, because no FRA regulation or action covers the subject matter of minimum track clearance, the Ohio regulation serves as a permissible gap filler in the federal rail safety scheme.

Tyrrell, 248 F.3d at 525 (citations omitted).

Here, CSXT has not presented any evidence that the FRA (or any other federal agency) has explicitly decided that no regulation is necessary in the area of rerouting hazardous materials to obviate terrorist threats.[7] Consequently, CSXT's preemption claims must be rejected pursuant to the specific terms of the FRSA.

The Legislation Does Not Unreasonably Burden Interstate Commerce.

The Board cannot determine constitutional questions. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 922–23 (1995) (*citing United States v. Nixon*, 418 U.S. 683, 704 (1974) (judicial power cannot be shared with Executive Branch); *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); *cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of

[7] One citation provided by CSXT indicates that the TSA, almost two years ago, "determined that, for the present, [current measures] adequately address the security concerns of which it is aware." 68 Fed. Reg. 34474 (June 9, 2003). However, that pronouncement was taken in the narrow context of employee-security concerns regarding the transportation of explosives. *See id.* at 34470 ("[T]he transportation of explosives via rail by certain persons described under the Safe Explosives Act does not pose a sufficient security risk warranting further regulation at this time."); *id*. at 34474 (terrorist attacks of 9/11 "indicate the need to assess the security of hazmat shipments, including individuals in a position to have access to sensitive information regarding, or the ability to control the movement of, explosives and other hazmat.").

the Constitution")). Nevertheless, the Board may apparently make findings on interstate commerce in the course of ruling on preemption claims. *See, e.g., Borough of Riverdale—Petition for Declaratory Order*, STB Finance Docket No. 33466 (STB served Sept. 10, 1999), at 8.

To the extent the Board may consider the impacts of the legislation on interstate commerce in light of the above discussion, CSXT's own allegations, even if true, reveal no impermissible burden on interstate commerce.

Plaintiff has clearly "misconstrued the role of" the Commerce Clause here. *SEIU, Local 82 v. District of Columbia*, 608 F.Supp. 1434, 1437 (D.D.C. 1985). This is not a quotidian economic dispute between railroads or between a railroad and a customer. CSXT's petition is nothing less than an attempt to stop the District's exercise of its broad police powers to protect its citizens from an unprecedented and unique threat.

In the typical case in which local laws have been struck down as violating the Commerce Clause, the law is usually a protectionist measure designed to insulate local industry from out-of-state competition. *See, e.g., Oregon Waste Sys., Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994) (state law imposed higher disposal fee on out-of-state waste). The challenged legislation is clearly not, by its terms, simple economic protectionism. CSXT cannot seriously contend that the legislation favors intra-District economic interests over out-of-state ones; neither the *source* nor the *destination* of the materials shipped here is implicated by the law—which makes no differentiation between interstate and intra-District commerce in terms of origin or ultimate destination of the hazardous materials, or for any other reason. The legislation has one and only one purpose—to protect the citizens of the District from the heightened risk of terrorist

attack faced by everyone who lives and works in or near the referenced area; any "burdens" CSXT may complain of are no more than incidental.

The Supreme Court has noted that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Phila. v. New Jersey*, 437 U.S. 617, 623-24 (1978).

Thus, if a local law is not simple economic protectionism, courts use the balancing test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), to analyze the law. If a statute regulates *evenhandedly* and has only *incidental effects* on interstate commerce, a court must balance the alleged *burden* on interstate commerce against the putative local *benefit*. *Id*. at 142 (citations omitted) ("the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved").

The law here explicitly allows the transportation of the referenced materials, if there is no "practical alternative route." Petitioner's Exhibit No. 1 at 2. There is no blanket "prohibition" on any items in interstate commerce. Consequently, the law is easily distinguishable from the economic-protectionism line of cases.

Additionally, "state safety regulations are accorded particular deference in Commerce Clause analysis." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (*citing South Carolina State Highway Dep't v. Barnwell Bros., Inc*., 303 U.S. 177, 189 (1938) and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978)).[8]

Here, the legislation will have undeniable security and safety benefits. In such circumstances, further Commerce Clause analysis is unnecessary:

[8] In *Electrolert*, the D.C. Circuit *upheld* a District-wide ban on the possession or use of radar detectors, rejecting a manufacturer's Commerce Clause arguments.

> [F]ive Justices have recently agreed that statutes based on nonillusory safety benefits are not subject to the dormant Commerce Clause balancing test. See [*Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 681 n.1 (1981)] (Brennan, J., joined by Marshall, J., concurring in the judgment) ("in the field of safety . . . the role of the courts is not to balance asserted burdens against intended benefits," but rather "once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests"); *id*. at 692 n. 4 (Rehnquist, J., joined by Burger C.J., and Stewart, J., dissenting) ("courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory"); see also *id*. at 670 (opinion of Powell, J.) (noting "strong presumption of validity" that attaches to safety regulations).

Electrolert Corp., 737 F.2d at 113.

The benefits of the law here are clearly "not illusory," and therefore the legislation should not be subjected even to the *Pike* balancing test. *Id*. ("In these circumstances we need not perform any fine balancing tests or inquire closely into the validity of the local government's reasonable factual assumption. Having satisfied ourselves that the local government's safety rationale is not "illusory" or "nonexistent," our inquiry is at an end.").

The benefits of the law could hardly be clearer—it protects an area targeted by, and at risk of, likely terrorist attacks. Based on the evidence before the Council, the added cost and delay associated with routing around the Capitol Exclusion Zone, even if proven, are not disproportionate when balanced against the public interest in avoiding a potentially catastrophic terrorist attack in a densely populated area that has already been, and continues to be, a high-risk terrorist target. *See Nat'l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 274 (2nd Cir. 1982) (costs and delay of rerouting tank truck shipments of hazardous gas around New York City "not unconstitutionally disproportionate when balanced against the public interest in avoiding a catastrophic accident in a densely populated urban area").

In light of this discussion, it is clear that the legislation does not have an impermissible burden on interstate commerce.

Conclusion

CSXT would have the Board nullify the District's obligation to protect its citizens' safety, based on its erroneous assertion that CSXT is immune to local regulation through federal preemption. The Board should not—indeed cannot—provide the relief CSXT seeks.

DATE: February 16, 2005

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General, D.C.

GEORGE C. VALENTINE
Deputy Attorney General, D.C.
Civil Litigation Division

_____
ROBERT UTIGER
Senior Counsel
Civil Litigation Division

_____
RICHARD S. LOVE
Chief, Equity I
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6635
Facsimile: (202) 727-0431

_____
ANDREW J. SAINDON
Assistant Attorney General
Equity 1
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Telephone: (202) 724-6643
Facsimile: (202) 727-0431
andy.saindon@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Opposition of the District of Columbia were delivered by facsimile and by U.S. Mail, postage prepaid, this 16th day of February, 2005, to:

Terence M. Hynes, Esq.
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8711 (f)

Mary Gabrielle Sprague, Esq.
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004-1205
(202) 942-5999 (f)

_____
ANDREW J. SAINDON